U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 23 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner's motion to reopen the director's initial denial was granted. The director subsequently denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst/software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education necessary for the visa classification as a member of the professions holding an advanced degree. The director further determined that the petitioner had failed to establish that the beneficiary possessed the requisite experience and denied the petition, accordingly.

On appeal, the petitioner submits additional evidence and asserts that the beneficiary satisfied the terms of the labor certification in that his associate qualification from the Institution of Engineers represents the equivalent of a bachelor's degree and that his work experience qualifies him for the visa classification sought.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree."[1] *Id.*

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[1]Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a "degree of expertise significantly above that ordinarily encountered." In this case, the petitioner has not asserted that the beneficiary falls within this category.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on June 21, 2007, which establishes the priority date.[2] On Part K of the ETA Form 9089, signed by the beneficiary on July 13, 2007, the beneficiary claims to have worked for the petitioner since July 24, 2006. Part H of the ETA Form 9089 sets forth the minimum education, training, and experience that an applicant must have for the position of a programmer analyst/software engineer. It reflects that the petitioner requires a bachelor's degree in any field of study plus 60 months of experience in the job offered of programmer analyst/software engineer. The petitioner will accept an alternate combination of education and experience consisting of a master's degree and 12 years of experience.[3] A foreign educational equivalent is acceptable and the petitioner's response to Question 10 of the ETA Form 9089 indicates that it will accept 60 months of experience in an alternate occupation. Job titles of alternate occupations are defined as "[p]rogrammer, developer, IT Manager, Team Lead, Programmer Analyst."

The job duties of the certified job are described in Part H-11 as:

> Analysis, design, develop and implement network applications and administer network and systems. Knowledge of SEI-Cmm quality methods and practices for Project implementation.

On Part J of the ETA Form 9089, listing the beneficiary's educational and other qualifications and skills, it is claimed on item 11 that the highest level of education achieved relevant to the certified job is a bachelor's degree. On Part J-12 -15, the beneficiary claims that his major field of study was electronics and communications engineering and that he completed his education in 2002 when he received his bachelor's from the Institution of Engineers (India). Therefore, the petitioner is seeking the advanced degree professional category based on the beneficiary's possession of a bachelor's degree and five years of progressive experience.

The record contains copies of the beneficiary's credentials as follows:

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[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

[3] It is noted that the corresponding DOL instructions related to Part H-8C of the ETA Form 9089 instruct the filer to state the experience in months, not years as indicated on the actual form. USCIS must read the terms of the labor certification as stated on the form. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

1) Copies of a certificate from the State Board of Technical Education and Training form the [redacted] and the corresponding marks certificate indicating that the beneficiary completed a three-year diploma course in electronics and communication engineering and established eligibility for the diploma on November 30, 1988.
2) A copy of a certificate and corresponding marks record from the State Board of Technical Education and Training, Govt. Inst. of Post Diploma Courses, Hyderabad, India, reflecting that the beneficiary completed a ½ year post diploma course Instrument Technology and established eligibility for the diploma on August 31, 1991.
3) Copies of marks sheets from The Institution of Engineers (India) from 1996 and from 1998 through 2002 reflecting his program of study relevant to Section A and Section B examination(s). The 1996 marks copy indicates he secured a final pass on Section A and the 2002 marks copy show that he secured a final pass on Section B in the summer 2002 with the declaration of result made on September 20, 2002.
4) A copy of a certificate from The Institution of Engineers (IEI) indicating that the beneficiary had been elected as an "Associate" on September 20, 2002.
5) A copy of a certificate from Naresh Technologies, Hyderabad, India indicating the beneficiary completed a course called Post Graduate Diploma in Computer Applications from June 1994 to December 1996. The certificate is undated.
6) Four other certificates from Zoom Technologies and Wilshire Software Technologies in Hyderabad indicating that the beneficiary received IT related certificates in 2003 and 2004.

As noted above, the Form ETA 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The petitioner initially submitted two credentials evaluations. One from the International Credentials Evaluation and Translation Services (ICETS), dated September 2004, written by [redacted] He states that in Sectons A & B Examination certificate program of the Institution of Engineers (India) significantly parallels programs in U.S. accredited colleges and universities. He determines that the beneficiary satisfactorily completed the academic requirements of Sections A & B Examination Certificate program and thus also "satisified similar requirements to the completion of a Bachelor of Science Degree in Electronics Engineering from an accredited institution of tertiary education in the United States." [redacted] language does not actually clarify whether he considers this to be a U.S. foreign equivalent bachelor's degree or an unquantified completion of credits equivalent to similar courses completed toward a U.S. bachelor's degree.

The petitioner submitted another evaluation, dated October 23, 2008, from [redacted] of Western Washington University. He refers to his listing of documents 1 and 3 as representing the beneficiary's completion of four years of education in electrical engineering. Document 1 is the beneficiary's 1988 three-year diploma course in electronics and communication engineering and document 3 is the beneficiary's completion of Section A and B of the Institution of Engineers and the award of the title "associate" of this organization. [redacted] then observes that the beneficiary undertook technical training as shown on his diploma in Computer Applications; however he does not assign a specific U.S. equivalency to it. He concludes that the beneficiary's education is comprised of what he terms as "four years of university-level instruction" and represents a U.S. equivalency of a bachelor's degree in electrical engineering with a specialization in electronics and communications. Upon the review of four employment verification letters from [redacted] also determines that the beneficiary has twelve years of progressive experience.

Counsel submits a third evaluation on appeal. It is from [redacted] of Seattle Pacific University. He determines that the beneficiary's 1988 three-year diploma in electronics and communications from the State Board of Technical Education and Training is the U.S. equivalent to his final two years of U.S. high school and one year of U.S. university level credits. Passage of Section A & B examinations and receipt of the Associate qualification is determined by Professor Knight to be the U.S. equivalent of three years of university level credits. He cites *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986) and concludes that the beneficiary has the U.S. equivalence of a Bachelor of Science in Electrical Engineering with a specialization in Electronics and Communication because he has the equivalent of 120 semester credit hours, and because the beneficiary's Associate recognition from the India Institution of Engineers is an educational qualification recognized in India and the U.S. as an acceptable credential for graduate admission. It is unclear how Professor Knight specifically calculated a U.S. equivalent of semester credit hours because the courses listed on the beneficiary's transcripts are not presented as representing any quantifiable amount of credit hours.

The AAO has also consulted The American Association of Collegiate Registrars and Admissions Officers (AACRAO) publications such as *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986) and the *P.I.E.R. World Education Series India: A Special Report on the Higher Education System and Guide to the Placement of Students in Educational Institutions in the United States* (1997). The 1986 *P.I.E.R. Workshop Report on South Asia* indicates that an associate designation in the Institution of Engineers (IEI) is based upon sequential examinations, prepatory courses and employment experience. An associate [AMIE (India] designation is "granted to applicants who are at least 22, who have a degree in engineering or have passed the Institution's Associate Membership Examination (Parts A & B), and who have at least one year of employment experience in engineering." *Id.* at p. I56. This is also reflected on the Placement Recommendations, beginning on I-85 in which an associate membership is based on passage of Parts A and B plus one year of employment upon which the applicant may be considered for graduate admission with no advanced standing. The 1997 *P.I.E.R. World Education*

Series also indicates that the Institution of Engineers, established in 1920, offers different levels of membership: 1) A (Associateship); 2) AM (Associate Member); 3) M(Member); and 4) F (Fellowship). *Id.* at p.102. An "Associateship/A" meaning the person is elected as an "Associate" is awarded to persons who are at least age 22, have passed the Section B Examination of this Institution or possess an educational qualification recognized by the Council as exempting them from Sections A and B Examinations, and have been engaged in the engineering profession in a satisfactory manner." *Id.* at p. 113. The next level of membership is the "Associate Member." It is awarded to persons who are at least 27, have qualifications for an Associateship Membership and additionally have at least five years of employment in the aggregate in the field of engineering. To qualify in the next level as a "Member," a person must be at least 32 years of age, have the qualifications of an associate membership and additionally have at least ten years of employment in engineering. A "Fellow" in the IEI is awarded to individuals who have the qualifications of an associate membership and additionally have at least fifteen years of employment in a position of high responsibility in engineering, or at least eighteen years of employment in the design or execution of engineering works, or who have high educational qualifications and are prominent in the profession of engineering. *Id.* at p. 113.

At the outset, it is noted that even if the beneficiary's professional credential of being an Associate of the Indian Institution of Engineers was eligible to be considered as a foreign equivalent degree under section 203(b)(2) of the Act and the regulation at 8 C.F.R. § 204.5(k)(2), which it is not, the priority date in this matter is June 21, 2007, and he did not achieve his status as an Associate until September 2002. Therefore, the qualifying five years of progressive experience, which must follow the foreign equivalent baccalaurate degree, could not have been completed before September 2007. Therefore, he would not have obtained the requisite education (bachelor's plus five years of progressive experience) as of the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); 8 C.F.R. § 204.5(k)(2).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the

alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)(Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991)(an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history. . .indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree*.
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> 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaurate dgree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree *Matter of Shah,* 17 I&N Dec. at 245.

Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, certificates, diplomas, or professional credentials, as is the case here, the result is the *"equivalent"* of a bachelor's degree rather than a *"foreign equivalent degree,"*

notwithstanding that an associate membership in IEI is sufficient to gain graduate admission or is equivalent to a bachelor's degree. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). This is not inconsistent with the AACRAO *P.I.E.R.* determination, which indicates that the associate membership is equivalent to a bachelor's degree but is not specifically a foreign equivalent baccalaurate degree within the context of the second preference visa category. In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent *degree*." (Emphasis added.) For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C)[4] requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent *degree*." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

While the IEI may offer courses and examinations, there is no evidence that the IEI is a college or university or that an associateship, or an associate membership, which is based on a combination of practical experience and examinations, is a "degree." The record indicates that the beneficiary has not received a baccalaureate *degree* from any college or university.

Relevant to the beneficiary's work experience, counsel is correct in pointing out that job duties as well as job titles should be examined to determine whether the experience may establish eligibility.

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[4] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

See Matter of Maple Derby, Inc., 89-INA-185 (BALCA 1991) (*en banc*). In this case, the following employment verification letters have been submitted:

a) A letter, dated July 10, 2008, from [redacted] was submitted confirming the beneficiary's employment with that firm from April 1992 through March 1999 as a **network professional.** The letter confirms the job duties of the position, but cannot be considered as part of the beneficiary's five years (60 months of experience) because it occurred prior to his claimed foreign equivalent degree on September 20, 2002.
b) A letter, dated July 31, 2004, from [redacted] stating the beneficiary had been employed as a network engineer and subsequently promoted in January 2003 to a "manager networking." As there was no description of job duties contained in this **letter, it does not verify any qualifying employment.**
c) A second letter from [redacted] was submitted, which is dated March 10, 2008. It confirms that the beneficiary worked at that company from June 2002 through August 2004. **This letter describes his positions as '** [redacted] **with** subsequent promotion to [redacted] **the** [redacted] Because the job duties and alternate occupations contained on the ETA Form 9089 are so generalized as to describing a fairly wide array of skills such as network and project implementation and management skills, this letter would be acceptable as documenting approximately one year and eleven months (from September 20, 2002 to August 2004) of progressive experience.
d) A letter, dated January 10, 2008, from [redacted] **indicating** that it had employed the beneficiary as a network administrator and senior network **administrator from April 1999 through April 2002.** It described his duties, but fails to establish that any of this experience may be considered as part of the five years of progressive experience, which must have occurred after September 20, 2002.

Except for the second letter from [redacted] we concur that the other employment verification letters are not sufficient to establish that this experience should be considered as part of the beneficiary's qualifying five years of progressive experience in the job offered or the alternate occupations specified on the ETA Form 9089. Further, as noted above, even if the beneficiary's employment verification letters were qualifying as to the appropriate job title and description of duties, and the Associate status was considered as a foreign equivalent degree, which it is not, five years of progressive experience following the degree could not be documented from September 20, 2002, when the beneficiary gained his Associate status and the priority date of June 21, 2007. The beneficiary has not established that he either possessed a master's degree or a baccalaureate degree followed by five years of progressive experience as required by the ETA Form 9089 or the advanced professional visa classification defined in section 203(b)(2) of the Act.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001); *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO's *de novo* authority supported by federal courts.)

It may not be concluded that the petitioner has established that this beneficiary possesses the advanced degree as required by the ETA Form 9089 or qualifies for visa classification as an advanced degree professional under section 203(b)(2) of the Act. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.